IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 21ST AUGUST 2007 / 30TH SRAVANA 1929

CRL.A.No. 1887 of 2006()

SC.1007/2001 of ADDL. DISTRICT & SESSIONS COURT (ADHOC I), KOLLAM
CP.109/1999 of JUDL.MAGISTRATE OF FIRST CLASS-I, KOLLAM

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APPELLANT: ACCUSED

JAYAKUMAR @ KOLUSU JAYAN,
S/O.RAVEENDRAN,
ALATTU VADAKKATHIL VEEDU, KANNIMEL CHERI,
SAKTHIKULANGARA VILLAGE.

BY ADV. SRI.S.GIRISH

RESPONDENT: COMPLAINANT

THE STATE OF KERALA REPRESENTED BY
THE DIRECTOR GENERAL OF PROSECUTION,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.A. NO.9671 OF 2006 IN CRL. APPEAL NO. 1887 OF 2006.

DISMISSED

21.8.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 1887 OF 2006

Dated this the 21st day of August, 2007

JUDGMENT

The accused in S.C. No.1007 of 2001 on the file of the Additional District and Sessions Court (Ad hoc-I), Kollam is the appellant. He faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellant - accused was that on 24.6.1999 at about 7.40 p.m., the accused was found in possession of arrack in five plastic covers of 100 ml. each at Gopikada junction, Minnathu cheri, Sakthikulangara village for the purpose of sale. To prove the case against the appellant, the prosecution examined PWs.1 to 4 and produced Exts.P1 to P6 as well as MOs.I to III. No oral or documentary evidence was adduced on the side of the defence. On closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He denied the prosecution allegations. The trial court, relying on the prosecution evidence, found the appellant guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a term of two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple

imprisonment for a further period of one year. Set off was also allowed under Section 428 Cr.P.C. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised the following contentions: (i) the trial court ought not to have placed reliance on the evidence of PWs.3 and 4 who were official witnesses as the independent witnesses who were examined as PWs.1 and 2 turned hostile to the prosecution, (ii) the trial court committed serious error in finding the appellant guilty under Section 55(a) of the Abkari Act as the prosecution had not proved that the contraband articles alleged to have been seized from the appellant were kept by him in connection with export, import, transport or transit. To substantiate this contention, the learned counsel placed reliance on the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631** and (iii) PW.4 had not complied with the provisions of the Abkari Act and the Kerala Excise Manual while detecting the offence and neither PW.3 nor PW.4 gave any

explanation for the delay caused in producing the contraband articles and the sample before the court. To substantiate this contention, learned counsel appearing for the appellant placed reliance on the decision of this Court reported in **Narayani v. Excise Inspector, 2002(3) K.L.T. 725** .

5. The trial court relied on the evidence of PWs.3 and 4 to find the appellant guilty of the offence alleged against him. PW.4 was the Sub Inspector of Police, Sakthikulangara who detected the offence and conducted investigation of the case. He stated that while he was on patrol duty, he got information that a person was selling arrack at Gopikada junction and that on reaching the place of incident along with the police party, he found the accused in possession of arrack in five plastic covers of 100 ml. each. He further stated that he took the contents of two covers as sample in a bottle of 375 ml. capacity, seized the remaining three covers of arrack as per Ext.P1 mahazar and arrested the accused on the spot at 7.40 p.m. after preparing Ext.P4 arrest memo. This witness further stated that the accused and the contraband articles were taken to the Police Station and Crime No.146 of 1999 was registered against the accused. PW.4 also stated that he had sent a forwarding note to send the sample for analysis. Ext.P6 is the chemical analysis report which showed that the sample contained 16.19% by volume of ethyl alcohol. PW.3 was the Police

Constable who had accompanied PW.4 on the date of the incident. He corroborated the evidence of PW.4 in all material particulars.

6. Regarding the contention of the learned counsel appearing for the appellant that the trial court ought not to have placed reliance on the evidence of the official witnesses as the independent witnesses turned hostile to the prosecution, there is no bar in proving the prosecution case on the basis of the evidence adduced by the official witnesses or the investigating officers, provided their evidence is free from doubt and any infirmity. The trial court found the evidence of PWs.3 and 4 acceptable. However, the question of believing the evidence of PWs.3 and 4 and the prosecution case will depend on the facts proved before the court. It was the specific case of PW.4 that the body of the accused was searched and five plastic covers each containing 100 ml. of arrack were seized from him as per Ext.P1 mahazar. But, there is no evidence to show that the plastic covers of arrack seized from the appellant - accused were sealed or labelled in the presence of any witnesses including PW.3. The evidence of PWs.1 and 2 also creates some doubt regarding the version of PWs.3 and 4. That apart, even though the contraband articles were seized on 25.6.1999, those were produced before the court only on 12.8.1999. PW.4 had not given any explanation for the delay in producing the thondy

articles before the court below. Further, though PW.4 stated that the contraband articles were kept in safe custody, no record was produced before the court below in this regard. In the decision reported in **Narayani v. Excise Inspector, 2002(3) K.L.T. 725**, this Court had categorically held that in the absence of any evidence to prove that the residue and sample were kept in proper custody till the date of producing the same before the court so as to rule out the chance of tampering, the prosecution case cannot be accepted. In the present case, though the residue and sample were seized on 25.6.1999, those were produced before the court only on 12.8.1999. Further, it is the duty of the excise officials to follow the procedure prescribed in the Abkari Act and the Kerala Excise Manual while detecting an offence. There is no record to show that PW.3 had accompanied PW.4 at the time of detection of the crime. He is not a signatory to any of the documents prepared by PW.4. Hence, the evidence of PW.4 does not give confidence to the court to accept the prosecution case that the appellant was found in possession of arrack in five plastic covers of 100 ml. each at Gopikada junction.

7. The trial court found that the appellant - accused committed offence punishable under Section 55(a) of the Abkari Act. As per the principles laid down in the decisions reported in **Surendran v. Excise**

Inspector, 2004(1) K.L.T. 404 and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631**, to attract an offence under Section 55 (a) of the Abkari Act, the prosecution must allege and prove that the contraband articles found in the possession of the appellant were in connection with export, import, transport or transit. Though the prosecution case was that the appellant was engaged in selling arrack, no evidence has been adduced in this regard.

8. On an overall appreciation of the entire evidence and the legal principles considered in this judgment, this Court is of the view that the appellant is entitled to a clean acquittal. Accordingly, the impugned judgment is set aside and the appellant - accused in S.C. No.1007 of 2001 on the file of the Additional District and Sessions Court (Ad hoc - I), Kollam is acquitted of the charges levelled against him. The appellant shall be released forthwith, if he is not wanted in connection with any other case.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

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